UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Charles Tamburello, Jr., Appellant,

v.

United States Postal Service, Agency.

Docket Number SE07528910270

Date: July 24, 1990

Charles Tamburello, Jr., Auburn, Washington, pro se.

Paul H. Mabus, San Bruno, California, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

This case is before the Board upon the appellant's petition for review of the July 15, 1989 initial decision that sustained his demotion. For the reasons discussed below, the Board DENIES the appellant's petition because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board REOPENS this case on its own motion under 5 C.F.R. § 1201.117, however, and AFFIRMS the initial decision as MODIFIED by this Opinion and Order, still SUSTAINING the agency's action demoting and reassigning the appellant.

BACKGROUND

The Appellant's Appeal and the Agency's Response

The appellant appealed to the Board's Seattle Regional Office from the agency's action demoting and reassigning him from the position of Manager, Station/Branch Operations, EAS-19, Step 9, in the Federal Way, Washington, Postal Facility, to the position of Quality Control Analyst, EAS-15, Step 9, in the Tacoma, Washington, Postal Facility, effective March 11, 1989. *See* Initial Appeal File (IAF) at Tab 5, Subtab A.

The agency had initially proposed the appellant's removal based on the following charges: (1) Sexual harassment of subordinate employee Julie Vance during the period of 1982 to 1983; (2) sexual harassment of subordinate employee Donna Lane in 1984; (3) engaging in conduct unbecoming a Postal supervisor in 1988, in exposing an employee, Cynthia Smith, to ridicule and embarrassment by asking her to walk down an aisle and stating to male employees that she was their Christmas decoration; (4) engaging in conduct unbecoming a Postal supervisor in 1980 in repeatedly asking female employees (Sharon Short, Donna Lane, Kathleen Frederick, and Julie Vance) for dates and berating them into going to lunch with him and attending job-related social functions; (5) engaging in acts of reprisal, during the period of 1983 to 1986, against Postal employees (Vance, Frederick and Lane) who rejected his sexual advances; and (6) creating an abusive and hostile work environment for several female employees who (a) rejected his sexual advances, (b) did not appreciate his sexual remarks, or (c) were friends of female employees who rejected his advances. *Id.* at Subtab E.[1] The deciding official found that all of the charges

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[1] The agency alleged that the appellant's conduct violated, in pertinent part, the following agency regulations:

> (1) Employee Labor & Relations Manual (ELM) 666.2, which requires employees "to conduct themselves during and outside of working hours in a manner which reflects favorably upon the Postal Service";
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> (2) ELM 671.112, which prohibits "discriminatory factors as a basis for postal employment decisions or related practices";
>
> (3) ELM 671.131, which prohibits sexual harassment; and
>
> (4) ELM 671.134, which charges both "[m]anagers and supervisors ... with the responsibility for preventing sexual harassment in the workplace and, if sexual harassment occurs, for taking immediate and appropriate corrective action." *See* IAF at Tab 5, Subtabs E, CC.

Because the agency charged the appellant with sexual harassment under its own regulations, under *Nikovitz v. Veterans Administration,* 40 M.S.P.R. 509, 512 (1989), the agency was required to prove only that the misconduct occurred and that it violated the agency's regulations.

The agency's regulations provide in pertinent part as follows:

> 671.131 The USPS is committed to providing a work environment free of sexual harassment in any form. Sexual harassment is improper and unlawful conduct which undermines the employment relationship as well as employee morale, and the USPS will not tolerate its presence in the workplace. Employees who are found to have engaged in sexual harassment should expect serious disciplinary action, including removal.

were supported by the evidence, but he reduced the penalty to a demotion and a reassignment. *See* IAF at Tab 5, Subtab A.

On appeal, the appellant denied the charges. He alleged that: (1) Vance initiated the sexual conduct, which he attempted to discourage, and that any friendship between them was not of a sexual nature; (2) he had no interest in dating Lane and was displeased with her work performance; (3) Smith misinterpreted the incident in which she was involved because the appellant intended no malice towards her; (4) he did not ask Short for a date but, rather, it was she who requested to meet with him to explain that the reason she was unable to notify the agency of her absence from work was that she was physically abused by her boyfriend; and (5) the allegations regarding Frederick should be dismissed because the agency failed "to state the claim alleged." *See* IAF at Tab 16. The appellant also alleged that he was prejudiced by the agency's delay in bringing the charges because some of the acts of misconduct charged "occurred long ago." *Id.* at Tab 10. The agency responded to the appellant's allegations on appeal, submitting evidence in support of its charges.

The Administrative Judge's Findings

After affording the appellant a hearing, the administrative judge found in the initial decision that the agency's charges were supported by preponderant evidence, and she sustained the demotion action. In this regard, she assessed the credibility of the witnesses in accordance with *Hillen v. Department of the Army,* 35 M.S.P.R. 453, 458 (1987),[2] and found that the testimony of the agency's witnesses in support of the charges was generally more credible than the appellant's testimony to the contrary. The agency's underlying specifications as to those charges and the administrative judge's findings are stated below as follows:

....

671.134 Managers and supervisors are charged with the responsibility for preventing sexual harassment in the workplace and, if sexual harassment occurs, for taking immediate and appropriate corrective action.

See IAF at Tab 5, Subtab CC.

[2] Under *Hillen,* some of the factors an administrative judge must consider in assessing a witness's credibility include the following: (1) The witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) the witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. *See Hillen,* 35 M.S.P.R. at 458.

Charge # 1

With respect to charge # 1, sexual harassment of Vance, the agency alleged that the appellant (a) elbowed her breast on one occasion, (b) convinced her to perform oral sex on him in her home, (c) asked her to perform oral sex on him in his office, (d) placed his hands down the front of her slacks in his office, and (e) after she no longer tolerated his sexual advances, acted in a such a hostile and abusive manner towards her that she left her supervisory position and returned to a craft position. *See* IAF at Tab 5, Subtab E.

The administrative judge found that Vance's testimony in support of the agency's charge was more credible than the appellant's denial. The administrative judge noted that Vance was forthright and honest in her testimony, even though some of her testimony could be considered detrimental to her best interests. The administrative judge also noted that Vance's testimony was consistent and was supported by other testimony. She noted that the appellant, on the other hand, appeared to avoid giving any testimony that was detrimental to him and that some of his testimony was controverted by other evidence. The administrative judge found that Vance consented to performing oral sex on the appellant in her home and that the agency, therefore, did not establish that the appellant's conduct in this regard was unwelcome. She also found that the appellant did not deliberately elbow Vance's breast. She found, however, that the appellant's subsequent conduct of requesting oral sex in his office and placing his hands down Vance's pants was unwelcome. She also found that the relationship between the appellant and Vance became so strained that Vance's psychological well-being and performance were adversely affected. The administrative judge therefore found that the agency proved sexual harassment of Vance in violation of its Employee & Labor Relations Manual (ELM) 671.131 and 671.134. *See* Initial Decision at 2-11, IAF at Tab 36.

Charge # 2

As to charge # 2, sexual harassment of Lane, the agency alleged that the appellant (a) repeatedly asked Lane to date him, (b) attempted to break up her relationship with a co-employee, Jerry Jennings, and (c) threatened to ruin her career if she did not cooperate with him. *See* IAF at Tab 5, Subtab E.

The administrative judge found that Lane was not a good witness. She noted that Lane spoke “rapidly” and “rambled.” She also noted that Lane was biased against the appellant based on a remark she had made that she was going to make the appellant “wish that he never heard her name.” Initial Decision at 15. The administrative judge found, however, that Lane's testimony that the appellant sexually harassed her and threatened to ruin her career was corroborated by other testimony. She found, though, that the adverse consequences that Lane suffered-reassignment from the Redondo Postal Facility,

a reprimand, and a suspension-resulted from the displeasure of higher management with her conduct. The administrative judge concluded that any threats the appellant made to Lane were work-related and were not based on her refusal to date him. Thus, the administrative judge did not sustain these specifications. *Id.* at 11-18.

The administrative judge sustained only the specifications relating to (a) the appellant's personal interest in Lane, (b) his inquiries as to why she dated Jennings and not him, (c) his persistent pestering of her with respect to her relationship with Jennings, and (d) his question to her as to whether her husband divorced her because she "fell asleep while making love." *See* Initial Decision at 12, 16-19. The administrative judge found that these incidents were of an unwelcome, sexual nature, and constituted sexual harassment in violation of ELM 671.131 and 671.134. She therefore sustained the charge on that basis. *See* Initial Decision at 17, 19.

Charge # 3

In regard to charge # 3, engaging in conduct unbecoming a Postal supervisor, the agency alleged that the appellant exposed Smith to ridicule and embarrassment when, after certain male employees complained that they had no Christmas decoration, he asked Smith to walk down an aisle in front of the men and then announced to them that she was their Christmas decoration. *See* IAF at Tab 5, Subtab E. Although the appellant explained that the employees concerned were referring to the Santa Claus hat that Smith was wearing, the administrative judge noted that Smith believed that they were referring to her person as well. The administrative judge also noted Smith's testimony that the appellant and the other employees involved apologized "profusely," and that, while Smith accepted the other employees' apologies, she did not accept the appellant's because she did not believe that he was sincere. The administrative judge found that, as a supervisor, the appellant should have known that his conduct was offensive. She found, however, that the agency did not prove that the appellant's conduct constituted sexual harassment inasmuch as Smith was the only employee who was wearing a Santa Claus hat and the agency did not establish that her selection to act as a Christmas decoration was based on her sex. The administrative judge found that the appellant's conduct did not violate ELM 671.112 because it did not amount to sexual harassment. She sustained the charge, however, on the basis that the appellant's conduct was unbecoming a Postal supervisor and violated ELM 666.2. *See* Initial Decision at 19-21.

Charge # 4

In regard to charge # 4, engaging in conduct unbecoming a Postal supervisor, the agency alleged that the appellant repeatedly asked female

employees for dates and berated them into going to lunch with him and attending work-related social functions. *See* IAF at Tab 5, Subtab E.

The administrative judge considered Short's testimony that the appellant repeatedly asked her to go out for drinks with him and that, when he stopped talking to her, she assumed that it was because she refused to do so. Short also testified that, at the appellant's request, she met him at a restaurant to discuss the abusive relationship she had with her boyfriend and that the appellant drew a "stick" person in a box to demonstrate her relationship with her boyfriend. The administrative judge found that the agency did not establish improper conduct by the appellant, noting that the appellant's concern with Short's welfare was reasonable and that his ceasing to talk to her could have been based on any number of reasons.

The administrative judge found, however, based on uncontradicted evidence, that the appellant acted offensively in berating Frederick and Vance into attending job-related social functions in violation of ELM 666.2. She found, though, that the agency did not establish that the appellant engaged in sexual harassment in violation of ELM 671.112 because the agency did not show that those employees' sex caused the appellant to act in the manner he did. She also found that the agency did not show that the appellant sexually harassed Lane by asking her for dates. Nevertheless, the administrative judge found this charge sustained based on the appellant's offensive conduct in berating Frederick and Vance into attending social functions. *See* Initial Decision at 21-25.

Charge # 5

As to charge # 5, engaging in acts of reprisal against Postal employees who rejected his sexual advances, the agency alleged that the appellant, fearful that his sexual advances toward Vance would become public, (a) repeatedly interrogated Vance about her friendship with another employee, causing her, on one occasion, to become so upset that she requested leave to go home, and, ultimately, to resign her supervisory position and return to the craft, (b) made the working environment for Frederick "so abusive and hostile" in interrogating her about her conversations with Vance, forbidding her to talk to Vance, and informing her that it would be easy to remove someone from the Postal Service by planting mail on one's person and calling the Postal Inspectors, that she gave up her acting supervisory position and returned to the letter carrier craft, (c) reassigned Lane to the "graveyard" shift and was accused by Lane of retaliation for rejecting his sexual advances, after she received a suspension and a letter of warning, both of which disciplinary actions the agency dismissed, and (d) frequently stated to Lane and Vance, in addition to Frederick, how easily he could remove someone from employment with the Postal Service by planting mail on one's person and calling the Postal Inspectors. *See* IAF at Tab 5, Subtab E.

The administrative judge found that the appellant's conduct in interrogating Vance was offensive and violated ELM 666.2, but did not violate ELM 671.112, because his questioning of Vance was motivated by his fear that his sexual advances towards her would be exposed. The administrative judge found that the appellant created an unpleasant working environment for Frederick, in violation of ELM 666.2, by constantly calling her into his office to warn her about her friends and berating her for periods of 1 to 3 hours for work-related mistakes, but she found that the agency did not show that the appellant violated ELM 671.112 inasmuch as it did not show that the appellant's conduct was based on Frederick's sex.

The administrative judge also found that the evidence did not establish that the appellant reassigned Lane or was responsible for the disciplinary actions against her in retaliation for her refusal to cooperate with his sexual advances since Lane's assignment at Redondo was temporary and the disciplinary decisions were not made by the appellant. The administrative judge further found that the agency did not show that the appellant threatened Frederick, Lane, or Vance when he remarked that he could easily have an employee removed by placing mail on that individual and then calling the Postal Inspectors, because Frederick's testimony established that the appellant was referring to another employee with whose performance he was displeased. The administrative judge found the charge sustained based on her findings that the appellant created an unpleasant working environment for Vance and Frederick in violation of ELM 666.2. *See* Initial Decision at 25-28.

Charge # 6

Finally, with respect to charge # 6, creating an abusive and hostile work environment, the administrative judge found that this was not a separate charge but that it was subsumed in the first five charges. Thus, she did not consider the charge. *Id.* at 28.

Efficiency of the Service and Reasonableness of the Penalty

The administrative judge then found that the appellant's conduct adversely affected the efficiency of the service. In determining the reasonableness of the penalty of demotion, she considered the following relevant factors: (1) The appellant's length of service (26 years with a good work record and no prior disciplinary actions); (2) the nature of the misconduct (which she found to be serious) and his supervisory position; (3) the fact that the appellant knew or should have known that his conduct was improper based on the agency's regulations and policies; (4) the appellant's supervisor's loss of confidence in his ability to perform, noting that his supervisor had lost confidence in his ability to perform his duties effectively as evidenced by his proposing the appellant's removal; (5) the notoriety of the misconduct, noting that the sexual harassment

charges were reported in a Postal Service newspaper and the "Federal Times"; (6) the appellant's potential for rehabilitation, noting that the deciding official had mitigated the removal to a demotion because he believed that the appellant had the potential for rehabilitation; and (7) the consistency of the penalty of demotion with the penalties imposed on other employees for similar misconduct. The administrative judge also considered, as mitigating factors, the fact that Vance had engaged in jokes and other conduct of a sexual nature with the appellant and the circumstances surrounding the third charge in relation to Smith. Nevertheless, she found that demotion was appropriate and sustained the agency's action. *See* Initial Decision at 28-30.

The Appellant's Petition for Review

In his petition for review, the appellant: (1) Challenges the administrative judge's credibility determinations and fact findings that were adverse to his defense; (2) contends that the administrative judge was biased against him and committed prejudicial error in the proceedings; and (3) contends that the penalty of demotion was unduly harsh. The agency has responded in opposition to the petition for review.

ANALYSIS

1. The appellant has not shown reversible error in the administrative judge's credibility determinations.

The appellant, in addition to reiterating his denial of the charges, challenges virtually every credibility and factual determination made by the administrative judge that was adverse to his interest. The appellant also disagrees with the administrative judge's assessment of the appellant's credibility and questions the credibility of witnesses Vance, Frederick, and Lane, as well as the credibility of agency employees Dallas Hardina and Sandra Wood. He, inter alia:
(1) Contradicts Vance's testimony that he sexually harassed her and treated her unfairly and that she was afraid of him, asserting that, despite her alleged fear of him, she returned to the Federal Way Postal Facility where he worked;
(2) disputes Frederick's allegation that he threatened to reassign her from her acting supervisory position if she spoke to Vance; (3) challenges Lane's testimony that he sexually harassed her on the bases that she was biased against him and had work-related problems; (4) challenges Hardina's testimony that Lane had complained to him in the presence of Postmaster Meservey that the appellant had been harassing her, arguing that the Postmaster alleged in his statement that Lane had never complained to him, that he had never witnessed any sexual harassment of Lane, and that Hardina testified on cross examination that he was having work-related problems; and (5) contradicts Wood's statements regarding the appellant's abusive behavior, alleging that Wood was biased

against him because of an unspecified incident involving the appellant and Wood's son, and because Wood and Lane were best friends. *See* Petition for Review at 1-28.

The appellant's allegations do not establish error by the administrative judge in her credibility determinations. The administrative judge properly applied the *Hillen* factors in assessing the credibility of the witnesses. She specifically indicated where testimony was uncontradicted or was corroborated by other testimony or evidence of record. She also specifically considered the witnesses' demeanor in arriving at her credibility determinations. Our review of the administrative judge's credibility determinations shows that the appellant has merely expressed his disagreement with those determinations. The appellant's mere disagreement with the administrative judge's credibility determinations, however, is not a basis for the Board's full review of the administrative judge's credibility and factual findings. *See Weaver v. Department of the Navy,* 2 M.S.P.R. 129, 133-34 (1980) (mere disagreement with the administrative judge's findings and credibility determinations does not warrant full review of the record by the Board), *review denied,* 669 F.2d 613 (9th Cir. 1982) (*per curiam*). *See also Jackson v. Veterans Administration,* 768 F.2d 1325, 1331 (Fed. Cir. 1985) (special deference must necessarily be given to the administrative judge's findings regarding credibility where those findings are based on the demeanor of witnesses). Therefore, we find no sound basis for disturbing the administrative judge's factual and credibility determinations based on the appellant's allegations of error by the administrative judge.

The appellant also contends that, in finding that the appellant had engaged in abusive and threatening behavior towards Lane, as alleged in charge ### 2, the administrative judge improperly considered the hearsay statements of former Federal Way Facility employees Doug Saxton and Darcy Lund that the appellant "was abusive and threatening." Petition for Review at 14-15. He contends that these witnesses' written statements should not have been considered because he was unable to cross-examine these witnesses. He contends that he should be allowed a new hearing or have the record reopened to afford him an opportunity to refute their allegations. *Id.*

We find no merit to the appellant's contentions. In *Borninkhof v. Department of Justice,* 5 M.S.P.R. 77, 83, 87 (1981), the Board held that hearsay evidence is admissible in administrative proceedings like this, and that, while hearsay evidence may constitute substantial evidence, it may not be sufficient to constitute preponderant evidence, and, thus, the assessment of the probative value of hearsay evidence necessarily depends on the circumstances of each case. One of the factors to be considered in assessing the weight to be accorded hearsay evidence is the existence of corroborative evidence. *Id.*5 M.S.P.R. at 87.

In the instant case, Saxton stated that he submitted his resignation from the Federal Way Postal Facility partly because of the "negative, verbal, persuasion-through-intimidation" tactics that the appellant used against him for "simple mistakes." IAF at Tab 5, Subtab G. He also stated that, at the end of a 1-hour "yelling" session, the appellant told him to "keep [the] conversation just between the two of [them]." *Id.*

Lund stated that he resigned from his position with the agency because of the frequent verbal castigations he received from the appellant. *See* IAF at Tab 9, Subtab CG. He stated that it was clear to him that the appellant wanted him "fired." *Id.*

The administrative judge found that Saxton's and Lund's statements indicated that the appellant was intimidating and threatening in his behavior to employees and that those statements, as well as others, were generally corroborative of Lane's testimony that the appellant threatened to adversely affect her Postal Service career if she divulged his comments to her or failed to cooperate with him. *See* Initial Decision at 17. Thus, the administrative judge properly assessed the probative value of the hearsay evidence in accordance with *Borninkhof.*

Accordingly, we find no basis to grant the appellant's request for either a new hearing or for reopening the record to allow him to address the hearsay evidence, and we DENY this request.

2. The appellant has not shown bias or prejudicial error by the administrative judge.

A party alleging bias or prejudice by an administrative judge must overcome the presumption of honesty and integrity accompanying administrative adjudicators. *See Biberstine v. Department of Defense Dependents Schools,* 37 M.S.P.R. 248, 256 (1988); *Oliver v. Department of Transportation,* 1 M.S.P.R. 382, 386 (1980).

The appellant contends that the administrative judge was biased against him and acted arbitrarily and capriciously in her findings and rulings. In this regard, the appellant contends that the administrative judge (a) did not mitigate the penalty even though, he asserts, many of the charges were not substantiated, (b) held the appellant responsible for sexual misconduct with Vance even though, he alleges, Vance was the aggressor, and (c) improperly rejected evidence that Vance was a vindictive individual.

With respect to the administrative judge's sustaining of the charges, we find that the appellant is confused as to the distinction between charges and specifications. The agency brought six charges against the appellant. Each of those charges was supported by underlying specifications. The administrative

judge, although finding that some of the underlying specifications were not sustained, nevertheless found the first five charges sustained and found that the sixth charge was subsumed in those charges. Thus, there is no merit to the appellant's contention that the administrative judge did not sustain all of the charges.

The appellant's contention that the administrative judge erroneously held him accountable for sexual misconduct with Vance is a mere challenge of the administrative judge's factual and credibility findings on this issue and has no merit as we found above. *See Jackson,* 768 F.2d at 1331; *Hillen,* 35 M.S.P.R. at 458; *Weaver,* 2 M.S.P.R. at 133-34. Furthermore, the fact that an administrative judge finds or rules against an appellant is not, in itself, evidence of bias. *See Bowen v. Department of Justice,* 38 M.S.P.R. 332, 336 (1988).

As to the appellant's contention that the administrative judge improperly rejected evidence that Vance was vindictive, the appellant identifies the rejected evidence as a letter by Victoria Svitak, a letter carrier at the Federal Way Postal Facility. The record shows that, by request dated May 30, 1989, the appellant attempted to have the letter admitted into evidence after the record closed. *See* IAF at Tab 31. The administrative judge rejected the proffered letter on the bases that (a) the appellant was previously aware that Svitak had knowledge of the information in her statement, i.e., her high opinion of the appellant and her observance of the witnesses in the workplace, and that he could have called her as a witness but did not do so, and (b) Svitak's allegations of improper conduct by Vance and Lane were irrelevant because the alleged misconduct related to their treatment of a co-worker, and it occurred after the close of the record. *Id.* at Tab 35.

The appellant has not shown that Svitak's letter constituted new and material evidence that could not have been submitted earlier with the exercise of due diligence. Therefore, he has not shown that the administrative judge erred by rejecting it or that the Board should now consider it on review. *See Santiago v. Department of the Air Force,* 3 M.S.P.R. 457, 459 (1980) (documents which could have been in a party's control throughout the proceedings are not new evidence). Also, the appellant has not shown here that the administrative judge was biased against him in this regard. *See Bowen,* 38 M.S.P.R. at 336.

The appellant also contends that he was impeded in his defense because the agency prevented him from taking depositions, and for other unidentified reasons. *See* Petition for Review at 37-38. The record shows that, by motion dated May 15, 1989, the appellant sought to compel the agency to make Frederick, Lane, Smith, and Vance available to be deposed on May 17, 1989. *See* IAF at Tab 23. The agency opposed the motion on the basis of timeliness and undue hardship. *Id.* at Tab 24. The appellant subsequently arranged to interview those witnesses informally. *Id.* at Tab 25. It is not clear whether the

appellant's attorney interviewed those witnesses inasmuch as the attorney alleged in a May 22, 1989 statement that the "[a]gency admitted telling its witnesses that no agreement had been reached as to witness interviews." *Id.* at Tab 30. In any event, the record indicates that the appellant did not timely and fully avail himself of the Board's discovery procedures. Even though the administrative judge notified him as early as March 20, 1989, that any motions for discovery were to be filed within 25 days of the March 20 order, he failed to comply with that order. *Id.* at Tab 2. Therefore, he has no basis for complaining that he was denied the opportunity for discovery. *See Thompson v. Department of the Interior,* 35 M.S.P.R. 322, 325 (1987) (an employee is not denied the opportunity to conduct discovery where he fails to initiate discovery in a timely fashion or to offer good cause for such delay).

The appellant contends further that, after the hearing was completed, the administrative judge held a conference at which the agency's representative, the appellant, and the appellant's representative were present. He asserts that the administrative judge stated in the conference that she did not believe that the agency had proved its case and urged the parties to settle because "all she could see was maybe improper conduct against Ms. Vance if she indeed decided to believe Ms. Vance's testimony." Petition for Review at 38-39. We note that the appellant's assertions are unsworn and are unsupported or uncorroborated by any evidence. Moreover, even if we assume that the appellant's assertions are true, he has not shown that such statements constitute prejudgment or were improper. *See, e.g., Barthel v. Department of the Army,* 38 M.S.P.R. 245, 250 (1988); *Biberstine,* 37 M.S.P.R. at 260. Even if the administrative judge erred in this regard, we find that the appellant has not demonstrated resulting prejudice to his rights. Therefore, he has not shown a basis for reversal in this regard. *See Karapinka v. Department of Energy,* 6 M.S.P.R. 124, 127 (1981) (the administrative judge's procedural error is of no legal consequence unless it is shown that it has adversely affected a party's substantive rights).

Additionally, we note the appellant's new contention that the Board is predisposed to sustain charges of sexual misconduct against managers and postmasters. *See* Petition for Review at 31. Since this contention is not based on error by the administrative judge or new and material evidence that was previously unavailable, it is not entitled to consideration by the Board. *See Banks v. Department of the Air Force,* 4 M.S.P.R. 268, 271 (1980) (the Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence); 5 C.F.R. § 1201.115.

3. The penalty of demotion and reassignment was appropriate.

The appellant contends that the penalty of demotion is excessive because the loss in income over the years will amount to over $100,000.00 until his retirement. He emphasizes that he has had 26 years of government service and an "outstanding" work record. He reiterates his contention that the charges should be given little weight because of the agency's delay in initiating the adverse action and contends that the administrative judge gave insufficient weight to the fact that Vance had voluntarily "bid back" to the Federal Way Postal Facility. *See* Petition for Review at 31-33.

We find that the administrative judge properly considered all of the relevant factors, except for the appellant's allegation of unreasonable delay by the agency in initiating the adverse action, in concluding that demotion was appropriate. *See Douglas v. Veterans Administration,* 5 M.S.P.R. 280, 306 (1981) (the Board will review the agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness). We agree with the administrative judge's ultimate conclusion that, even in light of the favorable mitigating factors discussed, the penalty of demotion was reasonable.

As to the appellant's allegation of unreasonable delay by the agency in bringing the charges, we find that the administrative judge's failure to consider this allegation as a possible mitigating factor did not prejudice the appellant's substantive rights. *See Panter v. Department of the Air Force,* 22 M.S.P.R. 281, 282 (1984) (an administrative judge's adjudicatory error that is not prejudicial to a party's substantive rights does not warrant reversal of the initial decision based on that error).

We find that the appellant has not shown that mitigation of the penalty was warranted based on his allegation of agency delay in bringing the charges. We note that the agency charged the appellant with sexual and other misconduct which began in 1980 and continued to 1988. *See* IAF at Tab 5, Subtab E. Thus, the agency charged the appellant with ongoing misconduct. Furthermore, the agency could not have taken disciplinary action against the appellant earlier because, based on alleged fear of retaliation by the appellant, no witnesses had previously come forward to complain about his conduct. *See* IAF at Tab 5, Subtabs H, K, L. Thus, the appellant has not shown that the agency's delay in bringing the charges was unreasonable.

Additionally, while the appellant asserts, generally, that the public attitude towards sexual harassment is less tolerant today than it was in 1980, he has not shown that he has been prejudiced by the delay. *See, e.g., Mauro v. Department of the Navy,* 35 M.S.P.R. 86, 94 (1987) (misconduct over 3 years old will not be dismissed absent a showing that the agency's delay was unreasonable or that the

delay prejudiced the appellant's rights). *See also Eikenberry v. Department of the Interior,* 37 M.S.P.R. 438, 447 (1988) (laches will not apply where the agency satisfactorily explains the delay and the appellant fails to show prejudice to his rights). Thus, the appellant has not shown that mitigation of the penalty is warranted based on the agency's delay in bringing the charges. Therefore, we find that the penalty of demotion was reasonable. *See Jackson v. Veterans Administration,* 30 M.S.P.R. 240, 242 (1986) (demotion to a nonsupervisory position was reasonable where (a) only one of five incidents of sexual harassment was sustained and that incident involved no physical contact or quid pro quo sexual harassment, (b) the appellant's past disciplinary record included only minor infractions, which were unrelated to sexual harassment, (c) although the appellant failed in his supervisory responsibilities, it did not appear that he could not perform satisfactorily in a nonsupervisory position, and (d) the appellant may benefit from counselling), *modified on other grounds,* 31 M.S.P.R. 135 (1986).

We find, however, that the administrative judge erred by not considering the appropriateness of the appellant's reassignment since it was also a part of the penalty. *See Brewer v. American Battle Monuments Commission,* 779 F.2d 663, 665 (Fed. Cir. 1985) (the Board has the authority to review the appropriateness of a reassignment that is a part of a reduction in grade). *See also Ballentine v. Department of Justice,* 30 M.S.P.R. 652, 661 (1986) (in determining whether favorable factors are sufficient to warrant mitigation, the Board must consider the appropriateness of the reassignment, as well as the demotion, where the reassignment is a part of the penalty imposed). Nevertheless, we find that the administrative judge's error did not prejudice the appellant's substantive rights. *See Panter,* 22 M.S.P.R. at 282.

The appellant's conduct in sexually harassing, threatening, and berating employees created an unpleasant and intimidating work environment for his subordinates. In fact, the record indicates that some of the witnesses against the appellant continued to be intimidated by him even after the agency had effected its action against him. *See* IAF at Tab 25. Furthermore, as noted above, the appellant's immediate supervisor has lost confidence in his ability to perform his duties effectively. Under these circumstances, we find that the appellant's reassignment was an appropriate part of the penalty. *See Ballentine,* 30 M.S.P.R. at 661.

ORDER

This is the Board's final order in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See 5* U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See 5* U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.